

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SETH SEMONICK)	
Claimant)	
)	
VS.)	
)	
SERVICEMASTER OF SOUTHEAST KS)	
Respondent)	Docket No. 1,044,572
)	
AND)	
)	
TWIN CITY FIRE INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the November 4, 2010 Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

Following a Regular Hearing, held on November 1, 2010, the ALJ issued an order referring claimant for an Independent Medical Examination (IME) with Dr. Lynn Ketchum to determine whether claimant is in need of any additional treatment to cure and relieve the effects of a February 16, 2009 accidental injury to claimant's upper extremities.

The respondent requests review of this Order arguing that the ALJ exceeded his authority to order an IME to determine the need for further treatment when both the authorized treating physician and claimant's retained expert agree claimant was at maximum medical improvement. Respondent also argues that the order was issued without giving it the opportunity to present evidence as required by statute.¹

¹ Respondent did not file any brief with the Board in support of its position thus it is impossible to know what evidence it might have wanted to offer. Moreover, the ALJ's Order provides for an opportunity for either party to take the deposition of the physician performing the IME and for an extension of the terminal dates. Thus, any potential harm has been avoided.

Claimant argues that the ALJ should be affirmed inasmuch as the ALJ was well within his discretion to order an IME at this juncture of the claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute in this matter as to the compensability of claimant's work-related injury. There is, however, a dispute as to the nature and extent of claimant's resulting impairment. And while both Drs. Moore (the treating physician) and Prostic (claimant's retained expert) have opined that claimant is at maximum medical improvement, the ALJ elected to exercise his discretion and appointed Dr. Lynn Ketchum to serve as an independent medical examiner and conduct an IME pursuant to K.S.A. 44-510e(a) and/or K.S.A. 44-516.² This Order directs Dr. Ketchum to examine claimant and provide a disability rating and recommendations, if any, for future medical treatment, restrictions and loss of task-performing ability, if applicable.³

Respondent appealed this Order alleging the ALJ exceeded his authority and failed to provide respondent with "the opportunity to present evidence as required by statute."⁴ Unfortunately, respondent filed no brief with the Board in support of this appeal, although there is an assertion in its Application for Review that "[j]urisdiction is proper pursuant to K.S.A. 44-534(a) and 44-551(i) as this matter involves a determination of whether the Administrative Law Judge exceeded his authority."⁵

The Order at issue is not one that establishes compensability, nor is the Order one for medical treatment. Thus, it is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an IME is an interlocutory order.⁶ K.S.A. 2008 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge..." The ALJ's Order referring claimant for an IME is, in the Board's view, interlocutory in nature.

² ALJ Order (Nov. 4, 2010) at 1.

³ *Id.*

⁴ Application for Review at 1 (filed Nov. 10, 2010).

⁵ *Id.*

⁶ See, e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (WCAB Apr. 2, 1999).

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.⁷ In *Skahan*,⁸ the Court of Appeals set out three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. In the Board view, an order referring a claimant for an IME does not satisfy these three criteria. The order for an IME will not conclusively determine the disputed question of claimant's ultimate impairment. That issue will remain to be decided by the ALJ and can be considered on appeal from the Award that is eventually issued.

For these reasons, the Board finds that there is no jurisdiction to consider this appeal. And while respondent also alleges the ALJ exceeded his jurisdiction, the Board finds the ALJ was wholly within his discretion to order an IME under these facts and circumstances.

K.S.A. 44-510e(a) provides in relevant part:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Under both of these sections, the ALJ is authorized to order a physician to conduct an IME. And while K.S.A. 44-510e(a) contemplates at least two opposing medical opinions

⁷ *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (WCAB Oct. 12, 1999).

⁸ *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

will be offered as a precursor to the appointment of a physician to conduct an IME, there is nothing within K.S.A. 44-516 that limits the ALJ's authority or discretion as to when that IME can be appointed. Here, it appears that, upon reflection of the claimant's evidence, the ALJ believed that an additional voice weighing in on the issue of claimant's need for additional treatment, impairment, restrictions and task loss, would prove helpful. Based upon this record, the Board finds the ALJ did not exceed his jurisdiction in ordering an IME.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated November 4, 2010, remains in full effect and respondent's appeal is hereby dismissed.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge